ALEC 2016 STATES & NATION POLICY SUMMIT

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CIVIL JUSTICE TASK FORCE BRIEFING

AMERICAN LAW INSTITUTE: A POWERFUL INFLUENCE ON STATE CIVIL JUSTICE LAW

I. Introduction

A. Foundation – The American Law Institute (ALI) is a powerful influence on state civil justice law. It was founded 93 years ago in 1923 to promote "the clarification and simplification of the law and its better adaptation to social needs."

B. The "Why" of the ALI – "Common law," which is law made by judges (and "common" in 1789), had by 1923 become increasingly diverse, complex, and, in many cases, difficult to ascertain across states.

C. What the ALI Is and Is Not – The ALI was formed to provide courts with a resource for better understanding, organizing, and developing the common law. ALI work products have never been, and are less so today, a simple system of surveying case law; majority rules are not always followed.

II. The ALI's Work Products

A. Restatements of the Law

1. Restatements of the Law are the most powerful and influential ALI work product. ALI scholars turn long, complex judge-made law into "black letter" rules. These black letter rules are supported by detailed commentary.

   For example, the Restatement (Second) of Torts defined a "battery" as "a harmful or offensive contact."

2. Restatements traditionally must be supported by existing case law.

3. Current draft Restatements of particular importance to the business community:

i. Restatement of the Law of Liability Insurance – This project has a significant "pro-policyholder" tilt. Gradually, however, it has become more balanced (see Attachment A). There is more work to be done to assure that it is fair and balanced. The project may be completed in 2017.

ii. Restatement of the Law of Consumer Contracts – This project represents a dramatic change for the ALI. Restatements for 93 years have not been separately categorized as "consumer" or "business." Further, much of the black letter relies on consumer protection acts, not case law (see Attachment B). It may also be completed in 2017.

B. Principles of the Law Projects

1. "Principles" projects focus on complex legal topics and may span judge-made common law, statutes, and administrative regulations. The ALI produces these projects when it sees need for a more careful study and exposition of a subject. Principles projects are typically addressed to state legislators, judges, and policy makers. They do not have the power of Restatements, but they can be influential on lawmakers.

   Two of the most famous Principles projects are Principles of the Law of Corporate Governance (1994) and Principles of the Law of Aggregate Litigation (2010).

2. The most important current Principles project is the Principles of Data Privacy. Its purpose is to guide the development of data privacy law by establishing "best practice" guidelines for businesses that collect and use individual's personal data. The project is expected to be completed in 2018.

C. Model Codes

1. These are model laws in which the ALI often works jointly with the National Commissioners of Uniform State Laws (NCCUSL). The most famous ALI model code is the Model Penal Code (MPC) launched in 1962. The MPC is the basis for a great deal of criminal law in many states.
2. The ALI is currently revising both the sentencing portion and the sexual assault portions of the MPC.

III. How ALI Work Products are Made

1. The ALI Leadership, namely the Executive Director and Deputy Director, suggest topics and appoint Reporters (always law professors) to draft the projects. The ALI Leadership also appoints Advisory Committees to assist the Reporters.
2. Drafts are reviewed by Advisors and also Members Consultative Groups.
3. An ALI Council then reviews the drafts.
4. The final drafts are approved (or not) by the ALI membership at Annual Meetings. They are usually not approved all at once, but rather in segments.

IV. How ALI Work Products Affect You as State Legislators

A. Assets – A guide for legislation.

Many ALI work products are well-researched and thoughtful assets in developing civil justice reform. For example, the Restatement (Third) of Torts: Products Liability (1998) has been used by state legislatures to formulate the basis of state product liability laws. Some Principles projects also may be helpful to state legislators.

B. Problems

1. On rare occasions, a part of an ALI project may go "off the rails." An example is the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012) in its adoption of a land possessor duty of reasonable care to trespassers. Traditionally, at common law, land possessors owe trespassers a very limited duty, namely, to refrain from causing a willful or wanton injury.

   Since 2011, twenty-two state legislatures have acted prophylactically to prevent state courts from adopting this part of the Restatement. This is the first time in the ALI's history that a Restatement has been preemptively rejected.

   In one state, Nevada, the state legislature overruled a court decision that had adopted the Restatement's radical approach. The legislature reinstated the traditional limited duty owed by a land possessor to a trespasser.

2. It is possible that such "rare" occasions become more frequent.
   i. Restatement of the Law of Liability Insurance – see Attachment A
   ii. Restatement of the Law of Consumer Contracts – see Attachment B
   iii. Restatement (Third) of Torts: Intentional Torts – see Attachment C
3. State legislatures may act both before and after the problem has occurred. Prevention of problems is the best way to assure that ALI Restatements and Principles projects are fair. This may be accomplished if ALI members and groups affected by an ALI project take action while the project is being developed.

   ALI members can sponsor new members who will be fair and balanced in their thinking (see www.ali.org).

V. CONCLUSION

Attachment A

4 Examples of Liability-Enhancing Provisions in Restatement of the Law of Liability Insurance:

1. "Plain Meaning" Rule – The Restatement adopts a novel approach that allows the "plain meaning" of an insurance policy term to be overcome by extrinsic evidence, creating uncertainty and inviting unnecessary collateral litigation.

2. Insurer Recoupment of Defense Costs – The Restatement adopts a blanket rule prohibiting insurer recoupment of defense costs. (This approach contravenes that of the ALI's Restatement Third, Restitution and Unjust Enrichment.)

3. Insurer Duty to Make Reasonable Settlement Decisions – The Restatement imposes automatic liability against an insurer that rejects any "reasonable" settlement offer even if the insurer acted reasonably in rejecting the offer, for example by trying to negotiate a lower settlement on behalf of its insured. In doing so, the rule, if adopted, would significantly impair insurer settlement negotiations and create new incentives for gamesmanship by claimants to manufacture an insurer's breach of this duty.

4. Adoption of One-Way Attorney Fee Shifting – The Restatement rejects the traditional "American rule" that each party is responsible for his or her own attorneys' fees and recommends that courts require an insurer to pay its insured's attorneys' fees whenever the insured prevails in an action against the insurer.

4 Examples of Key Improvements Made to the Restatement of the Law of Liability Insurance:

1. Misrepresentation – The Restatement had proposed a novel rule limiting an insurer's ability to rescind a policy based on an insured's misrepresentation in a policy or renewal application. The Restatement now follows the traditional common law rule.

2. Consequences for Breach of Duty to Defend – The Restatement had proposed a "strict liability" rule in which an insurer that breached its duty to defend forfeited all of its defenses to a claim, including its right to contest coverage. The Restatement currently adopts an "intermediate" approach that strips an insurer of its defenses only where the insurer had no reasonable basis for its conduct.

3. Cooperation – The Restatement had proposed a novel rule formulation which limited the scope of a policyholder's duty to cooperate with his or her insurer and created perverse incentives for an insured to purposefully subvert the insurer's claims handling processes.

4. Conditions – The Restatement had proposed a novel requirement stating that the insurer must show it suffered "prejudice" by the insured's failure to satisfy any policy condition in order to rely on that policy condition. This universal prejudice requirement was revised to apply only to provisions requiring timely notice of a claim.

Attachment B

Overview of the Draft ALI Restatement of the Law of Consumer Contracts

We have been involved in this project since it began in 2012. From the very beginning, we have questioned its basic purpose. The authors of this Restatement (called "Reporters") state that the project's purpose "is to identify a class of contracts that have presented separate challenges and concerns and have received special treatment." In spite of this proclamation, it is *the Reporters* who are creating this topic of law. In that regard, it is important to appreciate that in the ALI's 93-year history, the organization has never before separated out a general area of law (i.e. contract law) to develop a set of rules specifically aimed at "consumers." This has been true not only with Restatements of the Law of Contracts (for which the ALI has twice before "restated"), but also with respect to torts, property, agency, and every other ALI topic. (There is, for instance, no Restatement of "Consumer" Torts.)

In sum, the whole premise of the project is wrong; however, the judgment of the ALI leadership has been to allow the project to proceed as a Restatement of Law.

The Reporters of this project, knowing there is limited case law support for some of their innovations, have turned to Consumer Protection Acts and other statutes to support a number of the Restatement's "black letter" legal rules. Pro-plaintiff courts have used open-ended terms in Consumer Protection Acts to reach very unfair results against many businesses. Further, Consumer Protection Acts were *not* designed to set forth the law of contracts; the purpose of these statutes is to prevent deceptive practices, such as deceptive advertising in the promotion of products and services.

Specific Concerns with the Restatement's Proposed Rules

There are potentially serious concerns with the approach taken in most of the sections of this Restatement. There are three that are particularly illustrative. First, a significant concern pervading the analysis of multiple sections is the Reporters attempt to identify ways in which to undermine the use of binding pre-dispute arbitration provisions in consumer contracts. The Restatement does not attempt to void such agreements outright – because doing so would rather blatantly contradict U.S. Supreme Court precedent in cases such as *AT&T Mobility LLC v. Concepcion* upholding such agreements – but the Restatement is laying groundwork to do so in the development of the common law.

The Reporters, for instance, skirt the effect of *Concepcion* and other precedent interpreting laws such as the Federal Arbitration Act (FAA) by saying that, "The proper interpretation of the FAA and the proper application of preemption principles are outside the scope of the common law of consumer contracts. This Restatement cannot, nor does it purport to, address such issues. Rather, it restates the principles of consumer-contract law that would determine the enforceability of clauses that limit the ability of consumers to pursue a complaint or to seek reasonable redress, in the absence of constraints overlaid by federal law." In plain English, the Reporters overtly indicate that they are going to ignore the FAA and proceed as if it does *not exist*.

Second, and relatedly, § 5 of the draft Restatement appears to broaden and create greater uncertainty with respect to the doctrine of "unconscionability." The Restatement proposes a "black letter" rule which would empower a court to void (as unconscionable) a consumer contract term if it "unreasonably expand[ed] the business's remedies or its enforcement powers" or "unreasonably limit[ed} the consumer's ability to pursue a complaint or seek reasonable redress for violation of a legal right."

Third, § 6 of the draft Restatement creates a separate basis for a consumer to void a contract if the contract or an agreed upon term is "a result of a deceptive act or practice." This section, similar to the section on unconscionability, also includes vague, open-ended terms that would be deemed presumptively deceptive, namely an "affirmation of fact or promise that is inconsistent with the [contract's] standard terms" or "obscuring a charge to be paid by the consumer."

The effect of these Restatement provisions alone could provide a new basis for consumers to challenge many consumer contracts. The Restatement also proposes a "black letter" remedy provision (§ 9) in which a court would have virtually unfettered discretion to refuse to enforce all or part of a consumer contract for a violation of any of the draft's so-called "mandatory rules" (i.e. the Restatement's rules governing issues such as "unconscionability" or a "deceptive" contract). The remedy provision would also empower courts to reform consumer contracts to address a violating term, and do so in a manner that "operates against the business" where there is evidence of "bad faith."

Attachment C

THE WALL STREET JOURNAL.

OPINION | LETTERS

Emotional Sensitivity Is Clearly Getting Out of Hand

The Constitution provides many rights, but nowhere does it include the right to not be offended.

July 1, 2015

It was only a matter of time before hypersensitivity to previously innocuous phrases and behavior on college campuses would find its way into our legal system. Ronald Rotunda confirms the contagion has spread in "Thin-Skinned and Upset? Call a Lawyer" (op-ed, June 23).

A peek into the future ramifications of hypersensitivity was just provided by University of California President Janet Napolitano's request that UC faculty stop inadvertently perpetrating microaggressions. UC deans and department chairs were asked to attend seminars where they were taught that the following statements were offensive to some: America is a melting pot; America is a land of opportunity; the most qualified person should get the job; everyone can succeed in our society, if they work hard enough; and that gender plays no part in who we hire. Ms. Napolitano's objective is to eliminate all callous statements that perpetuate the myths of colorblindness and American meritocracy or imply that racism and sexism are not embedded in the fabric of our institutions. Ms. Napolitano previously served as President Obama's secretary of the Department of Homeland Security where she jettisoned the offensive word "terrorism" and replaced it with "man-caused disaster" (a term that arguably is sexist).

As more of today's hypersensitive college graduates get law degrees and jobs as lawyers, and bust the myths of American opportunity and meritocracy, we all may protect ourselves by making no eye or body contact and by not engaging in any conversations with strangers.

Ted Peterson *Richmond, Va.*

Virtually all injuries in a workplace are handled by worker compensation. Because it is a no-fault system, employees cannot sue employers for a tort. But there is a little known exception to this rule for "intentional torts." If an employer commits an intentional tort, employees can sue their employers in tort law. When this exception was created, the law of battery was objective, a contact that was harmful or offensive to a reasonable person.

The American Law Institute's draft Restatement of Torts protection of those with phobias, real or imagined, would create a piñata of potential lawsuits for savvy plaintiffs lawyers who would encourage employees to sue their employers. One can visualize the advertisements now.

Victor Schwartz *Washington*

The law of civil battery has always included offensive touching that "offends a reasonable sense of personal dignity." And what is "reasonable" has always been a flexible concept.

Merely touching a person's clothing or even a bag or cane held by that person could satisfy that standard. If John Doe were to intentionally touch in an offensive way a

yarmulke worn by an observant Jew, few legal eyebrows would be raised at a successful suit. Traditional civil tort law calls it a battery.

The key restraint is the need to prove that John Doe intentionally committed the reasonably offensive touching. Under the restatement, the Muslim woman in Prof. Rotunda's hypothetical example would have to prove that John Doe intended, that is, at least knew with substantial certainty, that a Muslim woman would consider it offensive. There are no accidental or merely negligent batteries.

The law does not favor Muslims over others. It simply acknowledges that religion is a deep part of a person's identity, be they Muslim, Jewish or Christian. Religion should have at least the offensive value of a piece of clothing, a bag or a cane. Few lawyers grow rich on such unusual cases where no physical harm exists.

Em. Prof. Michael Polelle *John Marshall Law School Sarasota, Fla.*

I sincerely hope that the American Law Institute's ruling on battery applies to TSA screeners who decide to touch airline passengers processing through security lines. There's nothing—nothing—that "offends a reasonable sense of personal dignity" more than having one's body searched in public by hired strangers, some of whom have abused the practice. If attorneys will consider these incidents torts and make them into cases, I'm all for the ALI's direction.

Brigit Morris

Capistrano Beach, Calif.

The Constitution protects many rights, but nowhere does it include the right to not be offended.

James Englehorn *Centennial, Colo.*

Task Force on Civil Justice
Tentative Meeting Agenda

2016 States and Nation Policy Summit | Washington, DC
Friday, December 2, 2016
2:30 - 5:30 PM

2:30 PM	Call to Order Welcome and Introductions Approval of Minutes from Annual Meeting
2:45 PM	Civil Justice Task Force Update
2:50 PM	State Legal Reform Activity Update
3:00 PM	Law Professor Series: Constitutional Law and our National Obligation to the Freedom of Speech
3:15 PM	The American Law Institute's Troubling Developments in Insurance Law
3:30 PM	Spotlight on a Judicial Hellhole: The Lawsuit Explosion in Missouri
4:00 PM	A Post-Election Outlook on Congress and Legal Reform Prospects
4:15 PM	**VOTE:** Resolution in Support of Nonprofit Donor Privacy
4:35 PM	Lawsuits vs. Safety Regulations: Seeking Out Complementary Systems
4:50 PM	Protecting Small Businesses from Frivolous Lawsuits
5:05 PM	Investing in the Market Economy by Fortifying Commercial Speech
5:20 PM	For the Good of the Order
5:30 PM	Adjournment

To access an electronic copy of these documents, please visit:
http://www.alec.org/task-forces/civil-justice/